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IN THE COURT OF APPEALS OF INDIANA

JOHN BOCHNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 52A05-0609-PC-476
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins-Burke, Judge
Cause No. 52C01-0511-MI-547

September 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

John Bochner appeals from the Miami Circuit Court's order granting transfer of his petition for writ of habeas corpus ("habeas petition") to the Johnson Circuit Court. Specifically, Bochner argues that the Miami Circuit Court should have held a hearing on the merits of his petition. Because we do not have jurisdiction to decide the matter on interlocutory appeal, we dismiss Bochner's appeal.

Facts and Procedural History[1]

In August of 1998, in a Johnson Circuit Court, Bochner was convicted of criminal deviate conduct and criminal confinement, and found by a jury to be an habitual offender. He was sentenced to seventy years imprisonment. On direct appeal, we reversed the habitual offender finding, resulting in the trial court's entry of an amended sentence of forty years. See Bochner v. State, 715 N.E.2d 416 (Ind. Ct. App. 1999), trans. denied. On January 31, 2000, Bochner petitioned for post-conviction relief, which remains pending.

On November 18, 2005, Bochner filed a verified petition for a writ of habeas corpus in the Miami Circuit Court, which had jurisdiction over him as he was imprisoned in the Miami Correctional Facility. The respondent, John VanNatta, filed a motion to transfer the case to the committing court. The motion was granted, and on December 7, 2005, Bochner's petition was transferred to the Johnson Circuit Court. On December 19, 2005, Bochner filed a notice of appeal regarding the transfer order, and the case is now before this court.

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[1] Bochner's Verified Motion For Leave To File Supplemental Appendix is hereby denied.

Discussion and Decision

Bochner argues that he was entitled to a hearing and a determination on the merits of his habeas petition by the Miami Circuit Court, which has jurisdiction over his location of incarceration, as opposed to transfer of his petition to the Johnson Circuit Court, which has jurisdiction as the location of his conviction. As a threshold matter, we address whether this court has jurisdiction to hear Bochner's interlocutory appeal. An appeal from an interlocutory order is not allowed unless the Indiana Constitution, statutes, or the rules of court grants specific authority to do so, and an appellate court may dismiss an appeal when it discovers it does not have jurisdiction. Bayless v. Bayless, 580 N.E.2d 962, 964 (Ind. Ct. App. 1991), trans. denied.

The State asserts we hold no jurisdiction of the Miami Circuit Court's transfer order because it may not be appealed as of right. Bochner does not claim, and the record does not indicate, that he obtained certification of the transfer order by the Miami Circuit Court for a discretionary interlocutory appeal under Indiana Appellate Rule 14(B). Rather, he filed a notice of appeal shortly after the transfer order was granted, indicating Bochner sought an interlocutory appeal of right under Rule 14(A).

The provision in Rule 14(A)(7) designates an appeal of right for "a writ of habeas corpus not otherwise authorized to be taken directly to the Supreme Court." This subsection is inapplicable because Bochner does not appeal on the merits of his habeas petition, which has yet to be decided. Rather, he appeals only the transfer of the habeas petition, which is not covered by the provision. Secondly, Rule 14(A)(8) provides an appeal of right for

"[t]ransferring . . . a case under Trial Rule 75." Although Bochner appeals the transfer of his petition, the Miami Circuit Court did so under Indiana Post-Conviction Rule 1(1)(c). Thus, Bochner does not have an interlocutory appeal of right, and we have no jurisdiction to hear his arguments against transfer of his habeas petition.

Nevertheless, even had the Miami Circuit Court certified the issue for a discretionary interlocutory appeal, and we accepted jurisdiction, we would conclude that the Miami Circuit Court properly transferred Bochner's habeas petition. Indiana Code section 34-25.5-1-1 provides that "[e]very person whose liberty is restrained, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered from the restraint if the restraint is illegal." "'The purpose of the writ of habeas corpus is to bring the person in custody before the court for inquiry into the cause of restraint.'" Partlow v. Superintendent, Miami Corr. Facility, 756 N.E.2d 978, 980 (Ind. Ct. App. 2001) (quoting O'Leary v. Smith, 219 Ind. 111, 113, 37 N.E.2d 60, 60 (1941)). A person is entitled to habeas corpus only if entitled to immediate release, and may not file a writ to attack a conviction or sentence. Id.

Trial courts do not have jurisdiction over a petition for a writ of habeas corpus where the petitioner is serving time under a proper commitment, his sentence has not expired, he has not been denied good time or credit time, and he is not seeking a correction of the beginning or the end of his sentence. Id. (quoting Young v. Duckworth, 274 Ind. 59, 61, 408 N.E.2d 1253, 1254 (1980)). Consequently, a petitioner must file a petition for post-conviction relief in the court of conviction, rather than a petition for a writ of habeas corpus

in the court in the county of incarceration, when he attacks the validity of his conviction or sentence and/or does not allege that he is entitled to immediate discharge. Id. (citing Ind. Post-Conviction Rule 1). Where a petitioner erroneously designates his action as petition for a writ of habeas corpus rather than post-conviction relief, trial courts may properly treat the petition as one for post-conviction relief, based on the content of the petition rather than its caption. Id.

Here, we affirmed Bochner's convictions for criminal deviate conduct and criminal confinement on direct appeal, his modified sentence of forty years has not expired, and his claims do not concern good time or credit time or a correction of the beginning or end of his sentence. Bochner claims he is entitled to immediate release, also stating

> he is not challenging the conviction (and subsequent sentence), per se, however he is challenging the illicit process utilized by the State so as to "contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

Appellant's Brief at 7 (quoting Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 1196 (1963)).

Bochner's reliance on Brady belies his assertion. Brady concerned a petition for post-conviction relief based on a prosecutor's nondisclosure of a confession in a murder trial, not a petition for a writ of habeas corpus. The United States Supreme Court considered the suppression of evidence to be a violation of due process, relying in part on language from Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935), which Bochner quotes with the exception of the last line: "Such a contrivance by a state to procure the conviction

and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." Brady, then, concerned a challenge to a conviction and sentence in light of a due process violation.

The allegations underlying Bochner's habeas petition also suggest that he is indeed challenging his convictions. He purports that the State "solicited and utilized known perjured testimony from two witnesses so as to perpetrate a fraud upon the court and jury." Appellant's Br. at 6. Bochner alleges that the State's due process violation resulted in a restraint of his liberty. Regardless of the merits of Bochner's claim, his liberty was restrained because he was tried, convicted, and sentenced, after which he appealed and his convictions were affirmed. Bochner's current allegations, despite his attempt to frame them otherwise, are a challenge to his convictions.

For this reason, the Miami Circuit Court did not improperly consider Bochner's habeas petition as a petition for post-conviction relief. Indiana Post-Conviction Rule 1(1)(c) explains that "if a petitioner applies for a writ of habeas corpus, in the court having jurisdiction of his person, that court shall under this Rule transfer the cause to the court where the petitioner was convicted or sentenced," which will treat it as a petition for post-conviction relief. As such, if we had jurisdiction over the present appeal, we would conclude that the Miami Circuit Court properly transferred Bochner's habeas petition to the Johnson Circuit Court.

Conclusion

Because the trial court did not certify this issue for a discretionary interlocutory

appeal, and because Bochner is not entitled to an interlocutory appeal as of right, we do not have jurisdiction over the issue of whether the Miami Circuit Court properly transferred Bochner's petition for a writ of habeas corpus to the Johnson Circuit Court. Concluding that we have no jurisdiction to decide the interlocutory appeal, we dismiss Bochner's appeal.

Appeal dismissed.

SHARPNACK, J., and NAJAM, J., concur.